No. 83-2132

In The

# Supreme Court of the United States

October Term, 1983

LUCKY STORES, INC.,

*Petitioner,*

v.

JOHN GARIBALDI,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

### Statement of the Facts

For purposes of this brief, Respondent adopts statement of facts by the Court below. [See Appendix D to the Petition, beginning at page D-1.]

Additionally, the Court's attention is drawn to the following paragraphs from the complaint filed in this action. Respondent respectfully submits that the allegations contained in the complaint in this case present considerably more than an "ordinary and typical work place dispute." [See Petition, page 11.]:

> "7. On or about March 27, 1979, plaintiff discovered that he had a bad load of milk and plaintiff reported this to his supervisors; defendant supposedly checked the milk load and found it to be 'okay'; defendant directed plaintiff to deliver said load of milk to defendant's Glendale grocery store; plaintiff contacted the Health Department and a Health Department inspector met plaintiff at the aforesaid store of defendant and condemned all fluid milk in the load.
>
> * * *
>
> 9. The termination of plaintiff was wrongful and offensive to the implied covenant of good faith and fair dealing that existed between plaintiff and defendant LUCKY STORES, INC.; defendants and each of them, did not act in good faith and did not deal fairly with plaintiff, but on the contrary, embarked upon a campaign of harassment and retaliation against plaintiff and wrongfully, unfairly, unreasonably and in bad faith suspended and terminated the plaintiff for reasons that offend public policy."

**Comments on Petitioners Presentation of the Case**

Throughout this case, Petitioner's theory of defense has been to characterize Respondent's state claim as an action predicated on the collective bargaining agreement, and thus, an appeal from an arbitration which was pursued as an administrative remedy under the collective bargaining agreement. The Ninth Circuit correctly rejected those arguments and found that the Respondent's

state claim was grounded on rights given under state law and not contract rights under the collective bargaining agreement. Nevertheless, Petitioner persists in these methods. Therefore, it is worth repeating that GARIBALDI's state claim for bad faith, wrongful discharge in violation of state public policy is grounded on rights given under state law and does not depend upon any contract rights given under the collective bargaining agreement. Thus, there has never been a federal question presented by GARIBALDI's complaint because GARIBALDI is not suing upon any right given under federal law and is not charging any violation of the collective bargaining agreement itself. As the Ninth Circuit noted, "Garibaldi has unequivocally pled wrongful termination in violation of public policy". [See Appendix D to the Petition, page D-114].

Petitioner has also sought to characterize this case as nothing more than "an ordinary and typical work place dispute", apparently in an effort to foreclose any consideration of the evidentiary facts to be presented at the time of trial. Respondent believes that the evidence will show that the Petitioner set things up before terminating Respondent. Indeed, Respondent testified in his deposition in this case that he was told shortly after the milk incident that he was on "borrowed time". Later, he was told by his supervisor: "We have ways of getting rid of drivers who don't cooperate. We can ride a person," . . . "hard enough and long enough until he quits or makes a mistake and gets fired, . . .". [See Appendix A, attached hereto].

Petitioner also suggested to this Court that Respondent's complaint was brought simply because Mr. Gari-

baldi was "not satisfied with the arbitration award, . . .". [See Petition, page 5]. This is simply not true. There are no allegations contained in the complaint with regard to the collective bargaining agreement, the arbitration or any dissatisfaction on the part of the Respondent with regard to the arbitration award. Respondent has repeatedly stated that following the arbitration award, he turned to state remedies under the State of California. Respondent pursued arbitration under the collective bargaining agreement because of his obligation to exhaust administrative remedies. Rest assured that if Respondent had not first exhausted all administrative remedies available to him, Petitioner would have raised the exhaustion doctrine as a defense in this case.

## Summary of Argument

The Ninth Circuit correctly ruled that removal was improper because Respondent's state claim did not raise a federal question and preemption is not a proper basis for removal. Secondly, the Ninth Circuit correctly ruled that the Respondent's state claim for bad faith wrongful discharge in violation of state public policy was not preempted under federal labor law. The Ninth Circuit's decision relies upon the decisions of this Court and an accurate analysis of the underlying issues to the preemption question.

———o———

## REASONS WHY THE WRIT SHOULD BE DENIED

### I.

### The Ninth Circuit's Decision Is Consistent With This Court's Decision

Two issues were raised before the Court below: First, was removal proper? Secondly, was GARIBALDI's state action preempted by federal labor law?

In considering the first issue, the Ninth Circuit followed the rules set down by this Court in *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936) and *The Fair v. Coller Dye and Specialty Co.,* 228 U.S. 22, 25 (1913). Stated simply, the Court looks to the face of the plaintiff's complaint to determine whether any claim brought against the defendant is dependent upon some right given under federal law. The Ninth Circuit looked to the GARIBALDI complaint filed in state court and determined that there were no rights being sued upon that were given under federal law. The Petitioner, however, charged the Respondent with "artful pleading." GARIBALDI countered that Petitioner was using the doctrine of artful pleading improperly through a false characterization of the complaint. The Ninth Circuit looked to the state claim being brought by the Respondent and determined that it was separate and independent of any contract right given under the collective bargaining agreement. The Ninth Circuit analyzed in considerable detail the common law tort action permitted in California against an employer, irrespective of the existence of an employment contract. In other words, GARIBALDI's state claim does not depend upon any contract rights given under the

collective bargaining agreement or any other federal law, but rather, rights given under state common law, and in this instance, the state's strong interest in protecting the health and safety of citizens of the State of California. [See Petition, Appendix D at D-14]. Finally, citing an abundance of case authority, the Ninth Circuit held that preemption was not a proper grounds for removal. Petitioner has never offered any reliable case authority to the contrary.

The preemption issued was decided against the Petitioner based upon careful analysis of GARIBALDI's complaint and the application of this Court's leading decisions in *New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519 (1979), *Farmer v. United Brotherhood of Carpenters and Joiners'* 430 U.S. 290 (1977) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). Petitioner's brief is completely silent on this Court's decision in *New York Telephone Co.* Petitioner tries to distinguish the *Farmer* case and *Alexander* case by trite distinctions and evasive analysis. The Court is told that the *Farmer* case is distinguishable because it did not involve the "finality of labor arbitration awards". [See Petition, page 5] Yet, when the Petition gets to the *Alexander* case, Petitioner is found arguing flood gates. If there are other employers retaliating against employees (union or non-union) for reporting public health violations, those employers should be sued in tort.

Petitioner ignores any discussion of *Farmer* and *New York Telephone Co.* because those cases dictate the proper analysis to be employed where the preemption question is raised. Actually, there are two issues presented by the preemption question: First, did Congress intend to oc-

cupy the entire field? Secondly, if not, is the state claim nevertheless preempted because it frustrates the implementation of federal law?

The first issue was decided by this Court sometime ago. In *Vaca v. Sypes,* 386 U.S. 171 (1967), this Court rejected any suggestion that Congress intended by the Labor Management Relations Act to occupy the entire field of labor law. In fact, this Court held that even actions predicated upon rights given under a collective bargaining agreement were not preempted under the exclusive jurisdiction of the NLRB. Further, the *Vaca* decision discusses the limited scope of *Steel* and its progeny. If GARIBALDI had brought an action in state court to vacate the arbitrator's award, then *Steel* and its progeny may have some application. However, GARIBALDI elected to turn to state remedies upon an exhaustion of all administrative remedies. Petitioner cannot have it both ways: Petitioner cannot expect GARIBALDI to exhaust administrative remedies so as to foreclose any defense based on the doctrine of exhaustion of administrative remedies, and then claim that GARIBALDI is foreclosed from turning to state remedies. This Court recognized in the *Vaca* decision that the contractual remedies available to the union employee "may well prove unsatisfactory or unworkable for the individual grievant". 386 U.S., at 185. In the instant case, any remedies available to GARIBALDI are clearly inadequate when compared to the tort remedies available to GARIBALDI under California state law, and the strong state interest in allowing the state claim to go forward for its remedial benefits to the citizens of the State of California.

In considering the preemption question, the Ninth Circuit noted that the mere fact that a matter may, in some way, be the subject of collective bargaining or the collective agreement, does not preclude pursuit of other rights given the employee. The question is whether GARIBALDI's pursuit of the state remedies available to him following an exhaustion of administrative remedies, will in some way frustrate the Legislative purpose of the Labor Management Relations Act or the collective bargaining processes. This Court defined the Legislative purpose in *Vaca v. Sypes,* 386 U.S. 171, 182: "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." Petitioner has failed to offer any meaningful explanation as to how GARIBALDI's pursuit of his state remedies will frustrate this Legislative purpose. Petitioner merely raises a flood gate argument and speculates that imaginative attorneys will invent public policy discharge cases (apparently much the same way that Petitioner's counsel invented an artful pleading charge against GARIBALDI's complaint.) Suffice it to say, however, that California limits the public policy discharge case to those cases where there are identifiable statutes reflecting legislative public policy. See *Mallard v. Boring,* 182 Cal. App.2d 390, 6 Cal.Rptr. 171 (1960). Petitioner's flood gates argument also defies the practicalities of real life. Obviously, not every union employee in the country is going to pursue a state action for wrongful discharge and retaliation based on violation of state public policy, when a dispute arises in their employment. For most disputes, the procedures provided under the collective bargaining

agreement serve to provide an orderly and expeditious resolution of the dispute. However, where the employer's conduct goes beyond the parties to the collective bargaining agreement and substantially affects not only the rights of the individual employee but also, the interest of the state and its citizens, then the state action better serves the interest of justice.

The Ninth Circuit weighed the respective interests and came to the following conclusion:

> "A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and the employee. The remedy is in *tort,* distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship."
>
> See *New York Telephone* 440 U.S. at 533 [Petition, Appendix D, at page D-15, 1 footnote omitted]

## II.

### The Garibaldi Decision Does Not Substantially Conflict With Decisions of the Seventh Circuit

In Petitioner's application for an extension of time to file the Petition for Writ of Certiorari, Petitioner argued to this Court that the Ninth Circuit's decision in GARIBALDI was in conflict with the Seventh Circuit's decision in *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983). In the Petition, however, the Petitioner abandons the *Jackson* case entirely. This is because the *Jackson* decision is actually supportive of the

Ninth Circuit's decision in GARIBALDI. In *Jackson*, the Court held that a state action for wrongful termination was preempted by the Railway Labor Act [45 U.S.C. § 153 (1976)], because the Railway Labor Act "has made any grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act, 45 U.S.C. § 153 First (i)." 717 Fed.Rptr. 2d, at 1052. The Court in *Jackson* noted by comparison, that Federal Labor Law does *not* provide that any grievance arising under the collective bargaining agreement would be subject exclusively to the arbitration remedies available to the employee. And, it is worth noting that one of the problems that *Jackson* faced with his action is that it was predicated on rights given under the collective bargaining agreement, and yet, he had failed to exhaust administrative remedies.

Instead of discussing the *Jackson* decision, the Petition turns to another Seventh Circuit decision in *Lamb v. Briggs Mfg.*, 700 Fed.Rptr. 2d 1092 (1983). Petitioner argues that the *Lamb* decision is at odds with the Ninth Circuit's decision in GARIBALDI because the Court in *Lamb* found a state action for wrongful discharge preempted by a collective bargaining agreement. Upon reading the decision, however, it becomes readily apparent that there is absolutely no discussion with regard to preemption and no analysis by the Court in *Lamb* as to how or why the state claim would be preempted under the rules set down by this Court in the cases cited above. The Court in *Lamb* justi-

fies its conclusion on the grounds that the availability of alternative contract remedies "obviates the need for a separate tort action" and then states as a "further ground" that allowing the separate tort action "would unreasonably disrupt the orderly arbitration procedure contemplated in the union contract". 700 F.2d at 1093. Yet, the decision is silent as to how or why the separate tort action would interfere with the arbitration process contemplated under the collective bargaining agreement. Instead, the decision ties its reasoning to the unique nature of the wrongful discharge action permitted under Illinois law. Again, there is no analysis based on the rules announced by this Court in *Farmer* or *New York Telephone Co.* Therefore, it follows that there is no substantial conflict between the Ninth Circuit's decision in GARIBALDI and the *Lamb* decision. The Ninth Circuit's decision is consistent with the Seventh Circuit's decision in *Jackson*. Further, the differences in result, between GARIBALDI and *Lamb*, is a function of the differences between the underlying state laws and the approach employed by the courts to the issues raised.

## III.

## CONCLUSION

The Petition for Writ of Certiorari should be denied. The Ninth Circuit's decision in GARIBALDI is a well reasoned opinion based on this Court's decisions in leading cases. The facts and circumstances surrounding the

GARIBALDI's claim, coupled with the strong state interest, justifies the conclusion reached by the Ninth Circuit.

Respectfully submitted,

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*Counsel for Respondent*

**APPENDIX**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 82 1479 LTL
(KX)

JOHN GARIBALDI,

Plaintiff,

vs.

LUCKY STORES, INC., ET AL.,

Defendants.

Deposition of John Garibaldi, taken on behalf of the defendants, at 611 Anton Boulevard, Suite 1400, Costa Mesa, California, commencing at 8:30 A.M., on Monday, October 25, 1982, before Jenee S. Webber, CSR No. 5446, a notary public in and for the State of California, County of Orange, pursuant to notice.

APPEARANCES:

| | |
|---|---|
| For Plaintiff: | Banks, Leviton, Kelley, Drass & Kelsey, Inc.<br>By: Fred J. Knez<br>1600 North Broadway<br>Tenth Floor<br>Santa Ana, California 92702 |
| For Defendant, Lucky Stores, Inc.: | Donahue, Gallagher, Thomas & Woods<br>By: Eric W. Doney<br>415-20th Street<br>Oakland, California 94612 |

(p. 111) A On May 23rd, 1980, Al Gregory, dispatcher, I felt that he treated me unfairly by trying to nitpick in a matter that which later proved unjustified.

Q Could you describe that incident?

A I delivered a grocery set of doubles to our Yorba Linda Store and returned to the yard and put my trailers away and went up to the dispatch office where he was standing, and he wanted to see my charts that were in my truck and my logbook, which had never happened before.

So I went out to my truck to get them and as I did so he sent one other dispatcher out with me and he checked my clock in my truck and came back in and he told me to take a seat while he pored over my records. He told me that my clock was five minutes slow and I didn't know how to tell time, and this is how the Gregorys speak, I better check with the dispatcher on a daily basis to see what time it was and he told me to start turning in charts and go on my next run.

I did so after I completed that run. I was very upset because it was an embarrassment for him, to me to apprehend me like that in front of my other fellow drivers which were standing there. I didn't say anything to him at the time. I went upstairs later and talked to Marshall Bohm about it voluntarily and told Marshall that I did this on my own, just one-to-one conversation between Marshall and myself, and I told Marshall that I felt Gregory was unjustified in his actions and I felt he was trying to get me fired for what he had said little over a year earlier when he said I was on borrowed time with the company and he had also had said which I found out at the (p. 112) company meeting that another driver, Jack Patent, I heard him say, "I should have fired that son of a bitch," to which Gregory does not deny saying those things.

Q You overheard this statement?

A I didn't overhear it, another driver overheard it.

Q Who?

A Jack Patent. I said, "Marshall, I've been doing the job with the company and I've been with you ten now and I don't think I need this kind of treatment." I said, "I've been doing my own work, keeping a low profile," and Marshall says, "Well, maybe you've been keeping too low a profile."

And then he says, "Well, you know, John, you've been the subject of a lot of conversation around here. You've caused a lot of excitement and it's not something that dispatchers easily forget."

And he's referring to the milk incident and this is over a year, this is in May 23rd, 1980 and that happened in March of '79.

Q Did you consider that statement a threat?

Mr. Knez: I'm going to object to the question as phrased, calling for a conclusion.

Mr. Doney: I'm asking what he thought it was, it's not a conclusion.

The Witness: Yes, I felt it was a threat, and then he said and I quote, "We have ways of getting rid of drivers who don't cooperate. We can ride a person," mean driver, "hard enough and long enough until he quits or makes a mistake and gets fired," unquote.